

Advice of the Ombudsman for Children on
the Civil Partnership Bill 2009

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1. Introduction

- 1.1. The Civil Partnership Bill 2009 was published on 26 June 2009 by the Minister for Justice, Equality and Law Reform. The aim of the Bill is to establish a statutory civil partnership registration scheme for same-sex couples and to provide for the rights and obligations of both opposite-sex and same-sex cohabitants.
- 1.2. Section 7(4) of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children may give advice to a Minister of the Government on any matter relating to the rights and welfare of children, including the probable effect on children of proposals for legislation. The advice below has been prepared in accordance with this statutory function.
- 1.3. The Civil Partnership Bill 2009 and the General Scheme that preceded it have been the subject of substantial legal analysis¹. The Bill has also been considered in great detail in the context of its passage through Dáil Éireann. The aim of this advice is not to duplicate those analyses and debates but rather to highlight concerns I have regarding the broad approach taken to the consideration of children's rights in the Bill and the impact the legislation will have on the children directly affected by it, in advance of the Seanad's consideration of the Bill.
- 1.4. While the Civil Partnership Bill 2009 addresses in significant detail the rights and obligations of civil partners and cohabitants in relation to each other, the Bill does not adequately address the rights and needs of children. It is clear that the situation of children was considered at length in the drafting of the Bill; it is unclear why that resulted in a Bill that did not prioritise the rights and interests of children. Although the situation of same-sex couples will be improved considerably by the enactment of the Civil Partnership Bill, the situation of children with same-sex parents will remain largely as it is at present.
- 1.5. It should be borne in mind that this is not a hypothetical problem. The omission of robust protections for the children of civil partners will have real consequences for the young people concerned and it is in their interests that the law reflect and provide for the reality of their lives. Current research being carried out in Ireland on the experience of young adult children with same-sex parents has indicated that there is a strong awareness among these young people of the lack of recognition of the reality of their family lives, and what that entails for

¹ See, for example, Irish Human Rights Commission, *Discussion Document on the Scheme of the Civil Partnership Bill* (2008); Irish Council for Civil Liberties, *The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications*, ICCL seminar series, vol. 1 (2009); Brian Barrington BL, *Legal Opinion on the Civil Partnership Bill 2009* (Marriage Equality: 2009); Dr Fergus Ryan, *The Civil Partnership Bill: Your Questions Answered* (GLEN: 2009)

them, their parents and their siblings². This lack of recognition and adequate legal protection is very keenly felt and a source of concern and frustration for them.

1.6. I appreciate fully that the matters relating to the rights and welfare of children in the Bill are complex and interact with areas of the law beyond the scope of the Civil Partnership Bill. Nonetheless, the failure to provide adequately for children in the Bill is concerning, particularly as no argument based primarily on the interests of children has been advanced by the Government to support its approach to children in the Bill. Indeed, the fact that other considerations can supersede the best interests of children in the drafting of legislation that concerns them so directly is a matter of serious concern.

² The research is being carried out by an independent research team commissioned by MarriageEquality to examine the experience of young adult children growing up in Ireland with LGBT parents. It has not yet been published.

2. Civil Partnership

Adoption and Guardianship

2.1. The Civil Partnership Bill does not address the questions of adoption and guardianship, leaving the law unchanged in this area with respect to same-sex couples³.

2.2. The options paper produced by the Working Group on Domestic Partnerships established by the Minister for Justice, Equality and Law Reform in 2006 (the Colley Report) considered in detail the very real difficulties which can emerge when a primary caregiver cannot adopt or become the legal guardian of a child for whom he or she is caring⁴. The Working Group made particular reference to the areas of health, education, maintenance and succession.

2.3. In relation to the possibility of extending the eligibility criteria for prospective adopters to include same-sex couples, the Colley Report made the following recommendation:

Given that the welfare of the child is paramount, in principle, same-sex couples who are married or in a full civil partnership should be eligible for consideration to adopt any child who is eligible for adoption. It should be noted that, rather than confer a right to adopt, this would allow registered same-sex couples the right to be considered for adoption, subject to the existing rigorous assessment process for prospective married couples and single adopters already in place under the Adoption Acts⁵.

2.4. In my advice to the Minister for Children and Youth Affairs on the Adoption Bill 2009, I addressed the question of eligibility criteria for prospective adopters in some detail⁶. With respect to same-sex couples, I recommended that the categories of persons eligible to apply for an assessment of suitability to adopt should be extended to remove the statutory bar on such couples from making an application; the exclusions maintained in the Adoption Bill offered the courts and the Adoption Authority an unnecessarily limited set of options when considering the interests of individual children whose circumstances vary enormously. The advice highlighted that by maintaining the eligibility criteria as they stood, the Bill would continue to deny to certain children the possibility of enjoying a permanent, secure legal

³ The Adoption Bill 2009, which has been passed by both Houses of the Oireachtas but has not yet been enacted, also leaves the law in this area unchanged. For an overview of the law relating to adoption and guardianship as it relates to same-sex couples, see Fergus Ryan, *The Civil Partnership Bill: Your Questions Answered*, pp. 98-100

⁴ See in particular section 3.06 of the Options Paper prepared by the Working Group on Domestic Partnerships (Department of Justice, Equality and Law Reform: 2006).

⁵ *Ibid.*, section 7.17, p. 50

⁶ Ombudsman for Children's Office, *Advice on the Adoption Bill 2009*, (OCO: 2009), section 6

relationship with both of their parents in situations where the child could benefit from an adoption.

- 2.5. During the course of the Oireachtas debates on the Adoption Bill, the Minister for Children and Youth Affairs indicated that the advice received by the Government was that constitutional difficulties could arise if the legislation sought to provide for the possibility of a same-sex couple adopting a child jointly⁷. This was echoed by the Minister for Justice, Equality and Law Reform during the course of the Dáil Committee Stage debates on the Civil Partnership Bill⁸.
- 2.6. However, the Minister for Children and Youth Affairs clarified that based on the experience of the foster services, the State has no difficulty with same-sex couples being parents or minding children⁹. The Minister also indicated a willingness to examine the possibility of providing for a form of special guardianship which could be conferred on non-biological parents in appropriate circumstances¹⁰.
- 2.7. At Report Stage in the Seanad, the Minister indicated that he had sought legal advice on the best vehicle for this matter and whether it could be provided for without a constitutional amendment. He went on to state that the options included the Civil Partnership Bill or amendments to the Guardianship of Infants Act 1964 or the Child Care Act 1991, and he undertook to consult the Minister for Justice, Equality and Law Reform on these options¹¹.
- 2.8. In light of these comments, it appears that it would be possible to provide in law for a form of special guardianship without rendering such legislation vulnerable to constitutional challenge, and that the Civil Partnership Bill is a potential vehicle for such a provision.
- 2.9. Given that such special guardianship orders could be beneficial to children in a range of circumstances beyond those immediately relevant to the Civil Partnership Bill - such as with step-families, families reorganised through divorce or for the children of a widow/widower - there is an argument in favour of addressing this issue by means of other legislation. Unfortunately, the opportunity to do so in the Adoption Bill 2009 was not taken up by the Government and it is unclear when there will be an opportunity to return to the issue¹². Against the background of the Minister for Children and Youth

⁷ Seanad Debates, Vol. 195, no. 7, col. 365 (13 May 2009)

⁸ See the comments of the Minister on proposed amendments to section 127 of the Civil Partnership Bill during the Committee Stage debates (24 March 2010)

⁹ Seanad Debates, Vol. 194 No. 6, col. 361(4 March 2009)

¹⁰ This is a form of guardianship which would give the special guardian parental responsibility without extinguishing the parental rights of the non-custodial biological parent

¹¹ Seanad Debates, Vol 195 no. 7, col. 369 (13 May 2009)

¹² The inclusion of a provision relating to special guardianship in the Adoption Bill 2009 was recommended by a number of organisations, including the Ombudsman for Children's Office. It was also recommended in the Department of Health and Children's *Adoption Legislation: 2003 Consultation and Proposals for Change* (Department of Health and Children: 2005). See

Affair's comments relating to the different possible vehicles for providing for special guardianship, it would be useful if the Government clarified its position on these options.

Recommendation

Provision should be made in law for special guardianship orders, either in the Civil Partnership Bill or in other appropriate legislation, particularly in the absence of an amendment to the law governing the eligibility criteria for adoption.

Shared home protection, maintenance, succession and dissolution

- 2.10. The issues of shared home protection, maintenance, succession and dissolution of civil partnerships are addressed in Parts 4, 5-7, 8 and 12 of the Bill respectively.
- 2.11. As indicated above, the Civil Partnership Bill 2009 has been the subject of substantial legal analysis and there are a number of published commentaries on the Bill which examine how it has and has not provided for children¹³. I will not rehearse all of the detailed and technical arguments but would like to make a number of general comments on the approach taken to children in the Parts of the Bill identified above.
- 2.12. As with other aspects of the Bill, the relationship between a child and his or her non-biological parent is not recognised or provided for directly in these areas, regardless of the quality or duration of their relationship. The relevant provisions of the Civil Partnership Bill closely resemble a number of different Acts of the Oireachtas which address these same issues in the context of families based on marriage; however, they differ in a number of important respects.
- 2.13. In relation to the protection of the family home, maintenance and divorce, the Courts are obliged under the relevant legislation to have regard to the needs of dependent children of the family¹⁴. In the equivalent sections of the Civil Partnership Bill, the reference to the need to provide for any dependent children has been omitted¹⁵.
- 2.14. The parameters of disadvantage are thus marked out clearly by the very legislation from which the provisions of the Civil Partnership Bill

in particular section 7 of the Ombudsman for Children's advice and Chapter 10 of the Department of Health and Children's report on the consultation.

¹³ See in particular the analysis of the Civil Partnership Bill 2009 by Brian Barrington BL and Dr Fergus Ryan, *supra* n. 1

¹⁴ See, e.g., section 4(2) of the Family Home Protection Act 1976, section 5(1)(a) of the Family Law (Maintenance of Spouses and Children) Act 1976 and section 5 of the Family Law (Divorce) Act 1996.

¹⁵ See sections 29(2) and 44(1) and Part 12 of the Civil Partnership Bill 2009

have been derived. Moreover, it is clear that the references to the needs of dependent children were removed deliberately. The distinction the Bill thereby creates between children of civil partners and children provided for under the other enactments mentioned above is arbitrary from the children's point of view. It is untenable to argue that their need for support, financial security and protection is any less important than the needs of other children.

2.15. In addition, the Civil Partnership Bill makes no provision for succession rights of a child with respect to a biological or adoptive parent's civil partner. Children in these circumstances cannot contest the will of a testate civil partner, nor would they have any right to a share of the estate of an intestate civil partner¹⁶.

2.16. It is clear that the crucial factor in deciding against making any provision for the relationship between a child and his or her biological or adoptive parent's civil partner is not the absence of a biological link, nor is it even necessarily the fact that the parent's civil partner is not the child's guardian. Step-parents can be called upon to maintain a spouse's child if he or she has acted in loco parentis to the child and has treated the child as a member of the family while knowing that the child is not his or hers¹⁷; this is not the case for a non-biological parent in a civil partnership. A child can sue for the wrongful death of a step parent¹⁸ but cannot do so for a biological parent's civil partner. A step-child is protected by the Residential Tenancies Act 2004 but the non-biological child of a civil partner is not¹⁹. In all of these cases, and indeed in others, it is clear the State is fully prepared to impose certain obligations on non-biological parents who may not even be the guardians of the children in question and to provide certain benefits to those children. It is unclear in light of this why none of these provisions has been emulated in the Civil Partnership Bill.

2.17. In some cases, it may be argued that the Civil Partnership Bill 2009 contains safeguards which will ensure that the courts take into account the needs of children in making any relevant orders once it is enacted. Sections 127(2)(l) and 206 in particular are relevant in this regard²⁰. However, if the intention of the legislation were to

¹⁶ See Part 8 of the Civil Partnership Bill 2009

¹⁷ See section 3 of the Family Law (Maintenance of Spouses and Children) Act 1976

¹⁸ See s.47(1) of the 1961 Act as amended by s.1 of the Civil Liability (Amendment) Act 1996

¹⁹ See section 39 of the Residential Tenancies Act 2004 and section 39 of the Civil Partnership Bill 2009.

²⁰ Section 127 sets out a number of factors to which the court must have regard in making certain orders under Part 12 of the Civil Partnership Bill. Subsection (2)(l) specifically relates to the rights of any person other than the civil partners but including a person with whom either civil partner is registered in a new civil partnership or to whom the civil partner is married, or any child to whom either of the civil partners owes an obligation of support. Section 206 states that in making an order under the Act and in particular in making a maintenance order, lump sum order, property adjustment order, pension adjustment order or order for provision from the estate of a deceased person, the court shall have regard to the rights of any other person with an interest in the matter, including a spouse or former spouse.

provide such protection to children of civil partners, then it should have done so explicitly and mandated the courts to consider the needs of children affected by such orders, rather than relying on courts to utilise the latitude provided by the Bill in a discretionary manner. It would not be unreasonable for a court to assume that the clear decision not to provide for the children of civil partners in the areas outlined above signified an intention on the part of the Oireachtas for there to be some substance to the difference in the level of protection afforded to those children.

- 2.18. Further, ss.127 and 206 can only help to ensure that account is taken of the child in the making of orders under the Bill. They do not – and cannot – help where the Bill has not given the courts the power to make an order in favour of the child at all.
- 2.19. For example, if a child's parent is deceased, anybody can apply to court on the child's behalf for maintenance from his or her step parent. But the Bill does not give anybody the right to apply for maintenance from a non-biological civil partner parent in similar circumstances. Therefore ss.127 and 206 cannot be used to protect the child. There are many other examples of this problem in important areas such as succession, protection of tenancies and the ability to sue for wrongful death.
- 2.20. I am mindful that the Minister for Justice, Equality and Law Reform outlined in detail the reasons behind the Bill's approach to these issues and the considerations which shaped the relevant provisions in the legislation: Article 41 of the Constitution, the desire to avoid addressing discrete questions relating to guardianship outside the context of wider reform of this area of the law, and the review currently being undertaken by the Law Reform Commission on the legal aspects of family relationships²¹. Nevertheless, the children of same-sex parents who enter into a civil partnership will be left at a clear disadvantage compared with other children if the Civil Partnership Bill remains as it is. It is incumbent on the Government to indicate more explicitly than it has done to date how it will address this serious gap to avoid a situation in which this discriminatory treatment is allowed to persist.

Recommendation

The Civil Partnership Bill should be amended to ensure adequate protection for the children of civil partners in the areas of shared home protection, maintenance, succession, dissolution of civil partnerships and related matters.

²¹ Supra, n. 8

3. Cohabitation

- 3.1. Part 15 of the Civil Partnership addresses the rights and obligations of cohabitants and sets out the manner in which redress can be sought by economically dependent qualified cohabitants.
- 3.2. Section 170 provides that a qualified cohabitant may apply to court for a range of orders if the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship. The court may, if satisfied that it is just and equitable to do so in all the circumstances, make a relevant order. In making such a determination, the court must have regard to a number of factors, including the rights and entitlements of any dependent child or of any child of a previous relationship of either cohabitant.
- 3.3. The obligation on the court to consider the rights and entitlements of dependent children or children of a previous relationship of either cohabitant in the context of applications made under section 170 is a welcome provision in the Bill. It is my understanding that this obligation will exist in addition to the individual obligation of support each parent has to a child under existing legislation.
- 3.4. Although it is clearly not the intention of the Civil Partnership Bill to address the broader questions of guardianship, custody and access which arise for unmarried cohabiting couples, the interaction between the Civil Partnership Bill and the reform of this area of the law must be borne in mind. In particular, consideration should be given to Ireland's obligations under the UN Convention on the Rights of the Child to guarantee the right of children to know and be cared for by their parents, as far as possible; and to ensure that a child has ongoing contact with his or her parents, unless a competent authority subject to judicial review determines, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child²².

²² See Articles 7 and 9 of the United Nations Convention on the Rights of the Child.

4. Conclusion

- 4.1. Although the situation of children was clearly considered in the drafting of the Civil Partnership Bill, the approach adopted was not one which placed the rights of the children who will be affected by the Bill to the forefront. Indeed, provisions from other areas of the law that acted as templates for the Civil Partnership Bill and which included references to the need to provide for dependent children of the family were adapted for the Civil Partnership Bill in a manner which effectively removed the protections afforded to children of marital families from children with same-sex parents in a civil partnership. This cannot be said to operate in those children's interests. Such an approach to policy formation and the drafting of legislation relevant to children gives rise to serious concerns about the subordination of children's interests on such an important matter.
- 4.2. Although there may be scope in the Bill for the courts to consider the situation of children of civil partners and their relationship with non-biological parents in the context of making various orders under the Bill, providing adequately for children in these circumstances should be mandatory for the courts and not subject to judicial discretion. Further, there are cases where it is clear that the courts will have no power to make orders to protect the interests of the child.
- 4.3. In addition, the Government should bear in mind that the Civil Partnership Bill may well give rise to violations of international human rights instruments to which the State is party. The differential treatment of children under the Civil Partnership Bill - especially when compared with the relationship between children and step-parents under Irish law - could well be found to be in breach of Articles 8 and 14 of the European Convention on Human Rights²³. It might also be regarded by the UN Committee on the Rights of the Child to be an unjustifiable interference with children's right not to be discriminated against in the enjoyment of the rights set out in the Convention²⁴.
- 4.4. It is encouraging that there has been a broad recognition in the Houses of the Oireachtas that the issues raised with respect to children's rights in the Civil Partnership Bill should be dealt with more comprehensively. It is also noteworthy that the Government is of the view that the proposed constitutional referendum on children's rights could possibly facilitate such a review of this matter²⁵.

²³ For a detailed discussion on this point, see Brian Barrington, *Legal Opinion on the Civil Partnership Bill 2009*

²⁴ See in particular Article 2 of the UN Convention on the Rights of the Child

²⁵ *Supra*, n. 8. During the course of the Committee Stage debates, the Minister for Justice, Equality and Law Reform said: "While we must always maintain the fine balance between the constitutional imperatives of equality on one side and the special recognition of marriage on the other, it is important to point out that aspects of taking care of children, specifically the children of same-sex partners and depending on those children's circumstances, would be better dealt with in the context of amending existing legislation, particularly the proposed

4.5. I hope that, whatever means are chosen, the deficiencies in the Bill identified above and in the many other submissions that have been made to the Minister and to the Oireachtas on this question will be remedied as soon as possible in the interests of the children who will be affected by these matters.

constitutional referendum... It would be wrong to suggest there is no existing protection for the children of same-sex partners. The Bill provides for their protection in terms of financial orders. There is agreement on all sides of the House that it would be preferable to deal with this matter in a more comprehensive way flowing from the proposed amendment.”